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ABSTRACT

The equal employment opportunity policies of the Reagan administration may be summarized in the following manner: while the administration will not retreat from the historic commitment to enforce federal civil rights laws, it will no longer insist upon, or in any way support, the use of quotas or any numerical or statistical formula designed to provide to nonvictims of discrimination preferential treatment based on race, sex, national origin, or religion. This policy has been adopted for several reasons: (1) Title VII of the 1964 Civil Rights Act, which mandates nondiscriminatory employment decisions, does not countenance racial quotas; (2) the economic and social strides gained by minorities in the 1960s demonstrated the capacity of minorities to compete effectively in a nondiscriminatory environment; and (3) there is no moral countenance for quotas. The number and nature of suits brought by the Justice Department to enforce equal employment opportunity legislation will not change significantly. In addition to seeking full redress for individual victims, the Department will continue to seek injunctive relief directing employers to make future nondiscriminatory employment decisions, and, where appropriate, will also seek percentage recruitment goals for monitoring purposes. (MN)

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Department of Justice

THE FOCUS OF EQUAL EMPLOYMENT OPPORTUNITY
PROGRAMS UNDER THE REAGAN ADMINISTRATION

Remarks by

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Before

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THE FOCUS OF EQUAL EMPLOYMENT
OPPORTUNITY PROGRAMS UNDER THE REAGAN ADMINISTRATION

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Thank you, Mr. McGovern. I am pleased to participate in this year's Continuing Legal Education Conference on Equal Employment Opportunity and to discuss with you my views and the views of this Administration on the important issue of equal employment opportunity. The right of equal employment opportunity obviously has a direct bearing on the full enjoyment of other cherished civil rights. If a person is denied employment because of race, national origin or sex, the consequences may well be serious enough to make other civil rights largely academic. Rights secured under fair housing laws, for example, have little practical significance to an individual who is denied employment on the basis of race or sex and therefore cannot earn a sufficient income to purchase decent housing. Similarly, a diploma has little value if, because of race or sex discrimination, it fails to open doors to positions for which the graduate was trained. It therefore naturally follows that to be free from unlawful employment discrimination is central to the full enjoyment of living in our free and enlightened society.

The role of the Department of Justice in the enforcement of equal employment opportunity laws is a limited, but significant, one. Under Title VII, the revenue sharing act, and other

federal statutes, the Department prosecutes suits against state and local government agencies to eliminate patterns and practices of employment discrimination, on grounds of race, sex, color, religion and national origin. The Equal Employment Opportunity Commission of course is authorized to bring suits against private employers under Title VII. Only when cases initiated by the Commission reach the Supreme Court does the Justice Department, through the Solicitor General, assume responsibility for representing the United States. The Justice Department also represents the Department of Labor, in particular the Office of Federal Contracts Compliance Program, both in bringing affirmative suits under Executive Order 11246, on referral from OFCCP, and in defending the Secretary and other Department officials against suits by contractors. In addition, the Civil Division of the Department of Justice represents other federal agencies in court in suits involving equal employment opportunity issues. That Division also represents federal officials who are sued by employees of their agencies, or prospective employees, for alleged violations of Title VII.

I have been requested to focus my remarks today on "the Equal Employment Opportunity Policies of the Reagan Administration." With respect to suits brought by the Department of Justice to enforce Title VII and similar statutes, our policy can be simply stated: The Justice

Department will not retreat one step from its historic commitment to enforce the federal civil rights laws, but we will no longer insist upon, or in any respect support, the use of quotas or any other numerical or statistical formulae designed to provide to nonvictims of discrimination preferential treatment based on race, sex, national origin or religion. To pursue any other course is, in our view, unsound as a matter of law and unwise as a matter of policy. Race-conscious and sex-conscious preferences are, as history has shown, divisive techniques that go well beyond the remedy necessary to redress, in full measure, injuries sustained by individual victims of discriminatory employment practices.

Title VII of the 1964 Civil Rights Act prohibits discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin. . . ." (42 U.S.C. § 2000e-2(a)(1)). That Title VII mandates color blindness in employment decisions was made clear not only in the Act's language, but also in the legislative debates preceding its passage. For instance, Senator Hubert Humphrey, a leading advocate of social equity and racial equality and the foremost proponent of the 1964 Civil Rights Act, decried the idea that Title VII would countenance racial quotas, remarking:

"It is claimed that the bill would require racial quotas for all hiring, when in fact it provides that race should not be used for making personnel decisions." 110 Cong. Rec. 6553 (1964). In like manner, remarks by the proponents of the legislation endorsed the view that Title VII established a principal of "colorblindness in employment." Id. at 6564. And in McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976), the Supreme Court interpreted Title VII to prohibit racial discrimination against white employees upon the same standards as would be applicable were they nonwhite.

During the 1960's, minorities made significant educational and economic strides with the assistance of statutory and decisional law outlawing racial discrimination. Minorities thus demonstrated a capacity to compete effectively with members of other groups under a regime of color-blindness. 1/

Impatience with the progress toward statistical parity with whites in the employment field, however, compelled some to urge use of racial formulas, such as hiring quotas and fixed goals, designed to achieve immediate numerical equality among the races in the work place; and the concept of race-conscious "affirmative action" was born. This new concept of "affirmative action" discarded

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1/ See T. Sowell, Affirmative Action Reconsidered (1975); T. Sowell, Knowledge and Decision 258-59, 355-56 (1980); R. Freeman, Black Economic Progress Since 1964, The Public Interest 52 (1978); Statement of Morris Abrams before Hatch Subcommittee on Constitutional Rights, at 9 (May 4, 1981).

notions that a racial preference is permissible only when necessary to place an individual victim of proven racial discrimination in the position he would have obtained but for the discrimination.

The proponents of this view sought the granting of preferences, not simply to individuals who had in fact been injured, but to an entire group of individuals, based only on their race or sex. It mattered not that those who benefitted had never been wronged, or that the preferential treatment afforded to them was at the expense of other employees who were themselves innocent of any discrimination or other wrongdoing.

During the 1970's, the concept of race-conscious and sex-conscious affirmative action in the employment field displaced the principle of color-blindness in many quarters. To be sure, those who endorsed this concept were motivated by the best of intentions. But it was no less esteemed an authority than Justice Brandeis, who wisely counseled: "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious enroachment by men of zeal, well meaning but without understanding." Olmstead v. United States, 277 U.S. 438, 479 (1928).

By elevating the rights of groups over the rights of individuals, racial and sexual preferences are at war with the American ideal of equal opportunity for each person to achieve whatever his or her industry and talents warrant. This kind of "affirmative action" needlessly creates a caste system in which an individual must be unfairly disadvantaged for each person who is preferred. Race and sex preferences inevitably introduce a divisive influence into the work place, the community, and the country as a whole.

Nor is there any moral justification for such an approach. Racial classifications, based as they are on a personal characteristic that is both immutable and irrelevant to employment decisions, are as offensive to standards of human decency today as they were some 84 years ago when countenanced under Plessy v. Ferguson, supra. I can make the point no better than did Professor Alexander Bickel in his eloquent remark:

> The lesson of the great decisions of the Supreme Court and the lessons of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. 2/

2/ A. Bickel, The Morality of Consent, 133 (1975).

Consistent with this overarching principle, I recently set forth in testimony before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, the policy that the Department of Justice henceforth intends to follow in its enforcement of the equal employment opportunity laws. As I there indicated, this Administration is firmly committed to the view that the Constitution and laws of the United States protect the rights of every person -- whether black or white, male or female -- to pursue his or her goals in an environment of racial and sexual neutrality. The color-blind ideal of equal opportunity for all that guided the framers of the Constitution and the drafters of Title VII holds the greatest promise of removing the stain of race, national origin, and sex discrimination from the Nation, and of realizing the proclamation of equality in the Declaration of Independence.

By embracing the principle of race and sex neutrality in the field of public and private employment, the Justice Department in no way intends to relax its commitment to remedy proven discrimination. Fidelity to the ideal of equality demands that no individual be disadvantaged in the work place because of unlawful discriminatory practices. The Department is firm in its resolve to seek, in suits under Title VII and similar statutes, affirmative remedies such as back pay, retroactive seniority, reinstatement, and

hiring and promotional priorities, to ensure that any individual suffering employment discrimination on account of race or sex is placed in the position that he or she would have attained in the absence of such discrimination.

Nor do we plan any change in the nature of suits brought to enforce federal law. Contrary to some newspaper accounts, we have no intention of limiting ourselves to separate lawsuits on behalf of separate individuals. We will, as in the past, bring "pattern or practice" suits against employers engaging in discriminatory practices affecting a substantial number of applicants or employees; and we will seek relief on behalf of all identifiable victims of discriminatory practices -- whether they be dozens or hundreds. In pursuing such cases, we will of course follow settled Supreme Court decisions holding that an employer shown to have engaged in a pattern of discriminatory employment practices must bear the burden o proving that a black or female claimant was denied employment or promotion for nondiscriminatory reasons. Franks v. Bowman Transportation Company, 424 U.S. 747 (1975); Teamsters v. United States, 431 U.S. 324 (1976).

In some circumstances, the granting of individualized relief will serve to advance victims into seniority positions, or onto career ladders, in preference to incumbent white or male employees shown to have been unlawfully favored. Similarly, appropriate relief should and will be sought for those qualified individuals shown to have been discouraged

from seeking positions because of past practices of unlawful discrimination on the part of the employer. The Department of Justice will be unyielding in its enforcement efforts to deter and remedy completely identifiable injuries attributable to discrimination in the work place.

In addition to seeking full redress for individual victims, the Department will continue to seek injunctive relief directing the employer to make future employment decisions on a nondiscriminatory race-neutral and sex-neutral basis. To ensure that the injunction is followed, we will require as part of the remedy that the employer make special efforts to reach minority or female workers through comprehensive use of employment recruitment techniques, such as media advertising and visiting high school and college campuses. In connection with this enhanced recruitment of minorities or women, the Department will insist that the employer periodically file records of its recruitment efforts.

Where appropriate, we will seek percentage recruitment goals for monitoring purposes. Such recruitment goals will serve as a triggering mechanism for Department inquiry into whether the employer has complied with the injunctive command to end its discriminatory practices. These recruitment goals will be related to the percentage of minority or female applicants that might be expected to result under a nondiscriminatory employment policy, after job related factors,

such as age, education, and work experience among various applicants are taken into account. When combined with fair and nondiscriminatory selection procedures, they should be sufficient to correct the effects of past discriminatory practices.

Because there may be legitimate, nondiscriminatory reasons underlying an employer's failure to satisfy a particular goal, the Department will not treat recruitment goals as inflexible standards which must be met by the employer without regard to qualification. At the same time, we will be alert to guard against employers, in an overzealous attempt to satisfy recruitment goals, engaging in reverse discrimination. Were we to treat the matter in any other light we would be vulnerable to the charge that we have sought to meet discrimination with discrimination. This the Department will not do.

In sum, our approach will emphasize a three-pronged remedial formula consisting of (i) specific affirmative relief for identifiable victims of discrimination, (ii) increased recruitment efforts aimed at the group previously disadvantaged, and (iii) color-blind as well as sex-neutral nondiscriminatory future hiring and promotion practices. It is our view that such relief will effectively overcome the effects of past discrimination without prejudicing the legitimate interests of others in the work force.